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U.S. Citizenship
and Immigration
Services



B6

FILE: EAC 02 140 51542 Office: VERMONT SERVICE CENTER

Date: SEP 16 2005

IN RE: Petitioner:
Beneficiary



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, revoked approval of the preference visa petition. The Acting Director treated a subsequent appeal as a motion and affirmed the previous decision, denying the petition. The matter is now before the AAO on a second motion. The motion will be granted. The previous decision of the Acting Director will be reversed. The petition will be approved.

The petitioner is an individual. It seeks to employ the beneficiary permanently in the United States as a Sunni Halal Indian live-in cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. Subsequent to approval of the Form I-140 petition, the Acting Director decided that the beneficiary was not qualified for the proffered position on the priority date of the petition. The Acting Director revoked approval of petition pursuant to section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155. The Acting Director reopened the matter pursuant to a subsequent motion, but affirmed the previous decision to revoke approval of the petition.

In support of the second motion, counsel submits a brief.

Section 205 of the Immigration and Nationality Act (the Act) 8 U.S.C. 1155 provides, in pertinent part,

The attorney general may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under Section 204. Such revocation shall be effective as of the date of approval of any such petition.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, “*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.”

The regulation at 8 C.F.R. § 103.5(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel provided new evidence. The motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are unavailable in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Eligibility in this matter hinges on the petitioner demonstrating that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on February 9, 2000. The labor certification states that the position requires two years experience in the proffered position. The labor certification states that the duties of the proffered position are to

Prepare meals for family and guests in strict accordance with the Halal Indian Sunni Cook dietary requirements. Season and prepare food in authentic and traditional Halal Indian Sunni Cook style and as per own and established recipes. Purcahse [sic] food and keep kitchen and dining area clean.

On the Form ETA 750, Part B, the beneficiary claimed to have worked for Mohammed Khalid, in Mumbai, India, as a Halil (sic) Indian Sunni cook from October 1995 to "present." The beneficiary signed that form on December 30, 1999.

With the petition, counsel submitted a letter, dated November 19, 1999, from [REDACTED]. That letter states that Mr. Khalid first employed the beneficiary during October 1995 and he continues to employ him as a live-in Halal Indian Sunni cook. That employment verification letter, if believed, clearly demonstrates more than two years of employment in the proffered position before the priority date. The Acting Director approved the petition on May 7, 2002.

Subsequently, additional evidence came to the attention of the Acting Director. At his immigrant visa interview, the beneficiary was questioned about Halal Sunni cooking, and related topics. The beneficiary seemed unable to define or describe [REDACTED], a term [REDACTED] to [REDACTED], but relating to Islamic dietary restrictions, and seemed unable to describe the Sunni style of cooking except to say, "they use red spices." The beneficiary also seemed unable to correctly prepare chicken tikka marsala.

The report of the visa interview further states that during his interview, which was conducted on February 4, 2003, the beneficiary claimed to have worked for the petitioner for the past ten years. The interviewer noted

that the petitioner, however, has lived in the United States since 2000, that the beneficiary claims to have lived in Mumbai for the past ten years, and that the beneficiary did not know where the petitioner lives.

On March 24, 2003 the Director, Vermont Service Center, issued a Notice of Intent to revoke approval of the immigrant visa based primarily on the report of the visa interview. The director noted that the beneficiary's inability to describe or prepare Sunni cooking indicates that he is not qualified perform the duties of the proffered position. The director also noted that the beneficiary's ignorance of Halal Indian Sunni cooking casts doubt on his claim of qualifying employment in the proffered position.

The petitioner was accorded 30 days to respond to the evidence adverse to the petition. The record does not indicate that the petitioner responded during that time. On October 17, 2003 the Acting Director denied the petition.

Counsel submitted a Form I-290B on November 6, 2003. Because that appeal had not been filed during the permitted period, the Acting Director chose to treat it as a motion. The motion states that the decision of denial failed to take notice of any of the evidence submitted in opposition to the Notice of Intent to Revoke.

With the motion counsel submitted an affidavit, dated July 31, 2003, from the beneficiary. In that affidavit the beneficiary stated that he did not fully understand the translator he was provided during the interview and did not believe that the translator fully understood him. The beneficiary further states that, in preparing the chicken tikka Marsala, he was obliged to use meats and spices from the consulate kitchen and given utensils with which he was unfamiliar. The beneficiary further stated that he does not know where the petitioner lives because he has never visited the United States. Finally, the beneficiary noted that the Form ETA 750 requires only two years of experience, whereas the petition was denied because he could not demonstrate ten years of experience.

With the motion, counsel also submitted another letter, dated July 22, 2003, from [REDACTED]. That letter states that the beneficiary worked 45 hours per week for [REDACTED] from October 1995 to February 2003, when [REDACTED] moved to the United States.

The Acting Director issued a decision on the motion on April 20, 2004. In response to counsel's observation that the evidence submitted in response to the Notice of Intent to revoke had not been addressed, the Acting Director noted that the record contained no indication of any response to the Notice of Intent to Revoke. The Acting Director conceded that the conclusions as to the food the beneficiary prepared were subjective, but stated that the beneficiary's inability to describe [REDACTED] Indian cooking was the basis for the revocation and that this basis had not been overcome. The Acting Director affirmed the previous decision revoking approval of the visa petition.

In the instant motion, counsel notes that the beneficiary claimed to have worked for [REDACTED] in Mumbai, India, and not for the petitioner. Counsel asserts that the confusion pertinent to that point contributed to the revocation of approval of the visa petition, and observes that this confusion supports the beneficiary's statement that he and the interpreter provided to him at his visa interview did not communicate well.

This office agrees that some misunderstanding occurred during the translated portion of the interview. First, the discussion of whether the beneficiary worked for the petitioner in Mumbai for ten years suggests that the beneficiary did not understand the question or the translator did not understand his answers. The beneficiary claims to have worked for ██████████ in Mumbai from 1995 until at least December 30, 1999, when he signed the Form ETA 750, Part B. The second employment verification letter submitted by ██████████ states that this employment continued until February 2003, and adds that on July 23, 2003, the date of that letter, the beneficiary was working for ██████████. Nowhere in the file does it appear that the beneficiary claims to have worked for the petitioner. Yet during the visa interview he was questioned about such employment and the resulting answers led in part to the ultimate revocation.

Similarly, that the beneficiary cannot state where in the United States the petitioner lives is consistent with his version of events, that he had never worked for the petitioner and had never visited the United States. Third, the opinions expressed pertinent to the style of food, its preparation, and the ultimate quality of the food the beneficiary prepared were subjective and not a reliable basis for the decision of revocation. Further, in his affidavit the beneficiary claims that the ingredients and utensils provided to him to prepare food were unfamiliar. Finally, even the consular report acknowledges that the dish the beneficiary was instructed to prepare, chicken tikka marsala, may not be commonly prepared by Sunni Halal Indian cooks.

The record reflects that each of the reasons listed by the consulate in its recommendation for revocation, and those ultimately relied upon by the director, have been shown to be either immaterial, mistaken, speculative, or credibly explained by the beneficiary.

In order to properly revoke a petition on the basis of an investigative report, the report must have some material bearing on the grounds for eligibility for the visa classification. The investigative report must establish that the petitioner failed to meet the burden of proof on an essential element that would warrant the denial of the visa petition. Observations contained in an investigative report that are conclusory, speculative, equivocal, or irrelevant do not provide good and sufficient cause for the issuance of a notice of intent to revoke the approval of a visa petition and cannot serve as the basis for revocation. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988).

This office finds that none of the bases of the decision to revoke approval of the instant visa petition rise to the level of good and sufficient cause to justify revoking approval of the instant visa petition. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The motion is granted. The decisions of October 17, 2003 and April 20, 2004 are withdrawn.
The petition is approved.